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Supreme Court, U.S.
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Docket No.

In the Supreme Court
of the United States

October Term 1995

DONALD CARSON, Petitioner,

- versus -

WATERFRONT COMMISSION OF NEW YORK HARBOR, Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit to review its judgment at Docket Number 95-5309

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March 26, 1996.

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QUESTION PRESENTED FOR REVIEW

Did the Waterfront Commission of New York Harbor exceed its lawful authority and act in derogation of the constitutional rights of Petitioner when it required Petitioner's removal from union offices following return of a guilty verdict and without waiting for sentencing, so as to prevent triggering of the unions' 29 U.S.C. § 504(d) duty to place Petitioner's salary in escrow and pay it to Petitioner after his conviction was reversed on appeal?

PARTIES BELOW

There were no other parties in the court of appeals.

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REPORTS OF OPINIONS

The decision below (1A) is published at Carson v. Waterfront Commission of New York Harbor, 73 F.3d 24 (3d Cir. 1995). The trial court's decision (32A) is unpublished.

Petitioner's earlier RICO conviction was vacated in an opinion published as United States v. Carson, 969 F.2d 1480 (3d Cir. 1992). An order dismissing the indictment against Petitioner on the government's motion subsequently was entered without opinion in the United States District Court for the District of New Jersey.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was announced on December 28, 1995. This Petition will be timely if filed no later than March 27, 1996.

Certiorari jurisdiction is established by 28 U.S.C. § 1254(1). District Court jurisdiction was invoked under 28 U.S.C. § 1332, and was also available under 28 U.S.C. § 1331.

STATUTES INVOLVED

The Compacts Clause, Article I, Section 10, Clause 3, United States Constitution, provides, in pertinent part: "No State shall, without the Consent of Congress . . . compact with another State, or with a foreign Power."

The Supremacy Clause, Article VI, Clause 2, United States Constitution, provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . ., shall be the supreme Law of the Land . . ., any Thing in the . . . Laws of any state to the Contrary notwithstanding.

Amendment XIV, United States Constitution, provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

29 U.S.C. § 504, as amended, provides, in pertinent part:

> (a) Membership in Communist Party or conviction of crime. No person . . . who has been convicted of . . . any felony involving abuse or misuse of such person's position or employment in a labor organization . . . or conspiracy to commit any such crimes . . . shall serve or be permitted to serve --
>
> (2) as an officer, . . . employee, or representative in any capacity of any labor organization . . ..
>
> (c) Definitions. For the purpose of this section --
>
> (1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under

appeal. . . .

(d) Person barred from office of labor organization during appeal of conviction; salary placed in escrow. Whenever any person --

(1) by operation of this section, has been barred from office or other position in a labor organization as a result of a conviction, and

(2) has filed an appeal of that conviction,

any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. Payment of such salary into escrow shall continue for the duration of the appeal or for the period of time during which such salary would be otherwise due, whichever period is shorter. Upon the final reversal of such person's conviction on appeal, the amounts in escrow shall be paid to such person.

The Waterfront Commission Interstate Compact, Part I of the Waterfront Commission Acts of New York (McKinney's Unconsol. N.Y.L. §§ 9801 et seq.) and New Jersey (N.J.S.A. 32:23), received congressional consent in 1953. Congress' consent also extended to future State "enactments in furtherance thereof." 67 Stat. 541.

Waterfront Commission Interstate Compact Article XV, paragraph 1, N.J.S.A. 32:23-68, provides in pertinent part:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing.

Section 8, found in Part III of the Waterfront Commission Act, N.J.S.A. 32:23-80, in pertinent part makes it a

misdemeanor to "solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within this State of New Jersey for or on behalf of any labor organization" that is subject to the Waterfront Commission's jurisdiction, if "any officer, agent or employee of the labor organization" has been convicted of any of various crimes, including the federal conspiracies of which a jury found Petitioner guilty, "unless he has been subsequently pardoned therefor."

STATEMENT OF THE CASE

29 U.S.C. § 504, providing for the removal of Communists and certain convicts from union office, was amended in 1984. The amendments made two pertinent changes in the law. First, the time of removal from union office by reason of conviction of certain crimes was advanced. Where previously the

convicted official remained in office until direct appeals were exhausted, the 1984 amendment removed the official from union office upon entry of a judgment of conviction. Amended Subsection 504(c). Second, a new provision required labor unions to escrow the salary of any person so removed from union office, and also provided that the escrowed salary would be paid to the removed officer if the conviction were reversed on appeal. Subsection 504(d). This Petition springs from the Waterfront Commission's response to the 1984 amendment, namely, demanding for the first time removal upon return of a guilty verdict.

Donald Carson, your Petitioner, was an officer and employee of the International Longshoremen's Association ("ILA") and two of its components when a jury in the United States District Court for the District of New Jersey found him guilty of conspiracies to violate the Hobbs Act,

18 U.S.C. § 1951, and RICO, 18 U.S.C. § 1962(d).

Two days after the jury returned its verdict, the Waterfront Commission of New York Harbor ("Waterfront Commission") demanded that the ILA comply with § 8 of the Waterfront Commission Act, N.J.S.A. 32:23-80, by removing Petitioner from union office. In so doing, the Waterfront Commission departed from its prior uniform practice of waiting for a judgment of conviction to enter before seeking removal of convicted union officers.[1] It later justified this change in practice by reference to a New Jersey Supreme Court holding that a conviction occurs upon return of a guilty verdict. See Local 1804, International

1. See, e.g., Local 1804, ILA v. Waterfront Commission, 171 N.J.Super. 508, 509, 410 A.2d 73 (App. Div. 1979) (verdict on April 11, 1978; removal from office demanded by Waterfront Commission on July 3, 1978), affirmed, 85 N.J. 606, 428 A.2d 1283 (1981).

Longshoremen's Ass'n v. Waterfront Commission, 85 N.J. 606, 428 A.2d 1283 (N.J. 1981).

The ILA, in response to the Waterfront Commission's demand, suspended Petitioner from office. The Waterfront Commission was not satisfied. It again wrote to the ILA, demanding Petitioner's removal. The ILA complied.

The Waterfront Commission thereby forced Petitioner's removal before entry of any judgment of criminal conviction. Consequently, the § 504(d) escrow triggering event -- removal from office by operation of § 504 -- never occurred.

After being forced from union office, Petitioner was sentenced. Subsequently, his conviction was vacated on appeal. United States v. Carson, 969 F.2d 1480 (3d Cir. 1992). The indictment thereafter was dismissed. However, because Petitioner had been removed from

office on the demand of the Waterfront Commission and not by operation of § 504, when he was later exonerated there was no escrowed salary to be paid to him. Cf. McMahan v. International Association of Bridge, Structural & Ornamental Workers, 858 F.Supp. 529, 543-544 (D.S.C. 1994) (unions are always free to fire convicted employees, at which point no further salary escrow contributions would be required).

Petitioner then sued the Waterfront Commission (and others) in the United States District Court for the District of New Jersey, for wrongfully interfering with his interest in the establishment of a § 504(d) salary escrow. On the Waterfront Commission's motion under Civil Procedure Rule 12(b)(6), the district court held that Petitioner failed to state a claim upon which relief

can be granted.

The Third Circuit affirmed on the authority of De Veau v. Braisted, 363 U.S. 144 (1960). In DeVeau, this Court rejected a claim that the Waterfront Commission acted in derogation of federal labor law or the Constitution by imposing a lifelong bar from union office upon one convicted of felony decades earlier.

This Petition followed.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD DETERMINE WHETHER THE SUPREMACY CLAUSE REQUIRES THE WATERFRONT COMMISSION TO CONSTRUE § 8 CONSISTENT WITH § 504(c), SO AS NOT TO FRUSTRATE CONGRESS' PURPOSE IN REQUIRING THE § 504(d) SALARY ESCROW

29 U.S.C. § 504 disqualifies from union office for a term of years those who are convicted of certain offenses. Section 8 of the Waterfront Commission Act, in contrast, imposes a lifetime disqualification and expands the list of disqualifying crimes. The Supremacy Clause issue before the Court in DeVeau was whether Congress had pre-empted the field of collective bargaining, thereby precluding the individual States from imposing additional qualifications for union office.

The DeVeau case came to this Court because a county prosecutor, invoking § 8

in 1956, demanded removal of a union officer who back in 1920 had pleaded guilty to grand larceny and received a suspended sentence. 363 U.S. at 145-146. In the DeVeau factual context, this Court found no incompatibility between federal labor law and the more restrictive demands of § 8. Congress, in essence, had established minimum standards for holding union office, and the more rigorous standard of § 8 was deemed a legitimate response by the State to a "peculiarly local" criminal problem. 363 U.S. at 154.

In the present case, the factual foundation upon which DeVeau was decided is completely absent. Petitioner, unlike DeVeau, was wrongly convicted. Moreover, Petitioner, unlike DeVeau, can point to a component of § 504 (as amended two decades after DeVeau) which was enacted for his benefit. Specifically, the salary escrow mandated by § 504(d) is

designed to ameliorate the consequences of a wrongful conviction. See McMahan, supra, 858 F.Supp. at 536-538 (reviewing legislative history), especially at 537 ("Congress sought to protect the interests of a debarred union officer whose conviction was improperly obtained by the government and later reversed" [footnote omitted]).

By demanding Petitioner's removal from office prior to sentencing, the Waterfront Commission acted with the specific purpose[2] to frustrate Congress' -- and Petitioner's -- interests in the

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2. This Petition arises from a Civil Procedure Rule 12(b)(6) dismissal. The facts therefore must be taken in a light most favorable to Petitioner. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Given that the Waterfront Commission was well aware of the 1984 amendments to § 504, and in every prior case the Waterfront Commission had waited until sentencing before seeking removal of a union officer, a reasonable fact-finder could easily infer that the reason why the Waterfront Commission acted with such novel haste in Petitioner's case was that it wanted to make sure he would never get the benefit of a § 504(d) salary escrow.

establishment and payment of an escrow, every bit as much as in Rose v. Arkansas State Police, 479 U.S. 1, 3 (1986) (per curiam), the State frustrated Congress' will -- and the intended beneficiary's financial welfare -- by treating a $50,000 federal payment to the estate of any police officer killed in the line of duty as an offset against death benefits funded by Arkansas.

Accordingly, this Petition calls upon the Court to determine the important question of whether the Waterfront Commission frustrates the operation of § 504(d) and thereby violates the Supremacy Clause when it invokes § 8 without waiting for the entry of a judgment of conviction.

2. THIS COURT SHOULD DETERMINE WHETHER NEW JERSEY'S MEANS OF RIDDING THE WATERFRONT OF CRIMINAL ELEMENTS IS REASONABLE WHEN APPLIED TO ONE WHOSE CONVICTION IS LATER SET ASIDE

The DeVeau decision was concerned with forced removal of a union officer by reason of a final criminal conviction entered against him decades earlier. Starting from the fact of that final criminal conviction, Justice Frankfurter, speaking for four members of this Court, found no conflict between federal labor policy and New York's policy, under § 8, of permanently removing ex-convicts from positions of union leadership. The DeVeau plurality upheld § 8 against a barrage of constitutional challenges in the view that New York has a rational non-punitive interest in setting occupational qualifications such as those embodied in § 8. 363 U.S. at 158-160.

Justice Brennan concurred, thereby

establishing a majority. He was of the view that Congress intended § 8 to withstand pre-emption by federal labor law and that § 8 embodies "a reasonable means for achieving a legitimate state aim, and does not deny due process or otherwise violate the Federal Constitution." 363 U.S. at 161.

In the present case, the foundation for the DeVeau decision -- a criminal conviction -- is absent. Petitioner's conviction was overturned and the indictment thereafter was dismissed.

The State of New Jersey, acting through the Waterfront Commission, cannot possibly have any legitimate interest in depriving one wrongfully convicted of the benefit of the § 504(d) escrow.[3] Neither

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3. Nor can the State have any legitimate interest in perpetuating a § 8 disqualification from office after the underlying conviction is reversed. Nevertheless, by the terms of § 8, disqualification can only end upon a "pardon" in the convicting jurisdiction, or a "certificate of good conduct" from its parole board. Even if it were

can the State have any substantial interest in effecting removals from union office shortly before sentencing, rather than at sentencing, the means by which the federal escrow requirement is defeated. Nevertheless, the court of appeals found DeVeau controlling.

Accordingly, this case presents an appropriate vehicle for determining whether New Jersey's interest in ridding the waterfront of criminal elements provides a constitutionally sufficient basis under the Due Process Clause for imposing sanctions on a non-criminal and depriving him of his property interest in a § 504(d) salary escrow.

[footnote continued]

politically expedient to do so, it is doubtful that either of those remedies would be available to one whose conviction has been overturned.

3. DE VEAU'S UPHOLDING OF CONGRESS' CONSENT FOR NEW YORK AND NEW JERSEY TO MAKE FUTURE ENACTMENTS IMPLEMENTING THE WATERFRONT COMMISSION COMPACT SHOULD BE REVISITED IN LIGHT OF CHADHA

In upholding § 8 from the challenges raised in DeVeau, Justice Frankfurter's plurality opinion found it especially persuasive that "in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting consent 'that the consent of Congress is hereby given to the compact set forth .. . and to the carrying out and effectuation of said compact, and enactments in furtherance thereof.'" 363 U.S. at 151. "This provision in the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts." 363 U.S. at 154.

Congress' approval of an interstate

compact consenting in advance to future State "enactments in furtherance thereof" was indeed "extraordinary," as Justice Frankfurter opined. It was extraordinary in more than one way. Beyond being "unique," it was tantamount to an abdication of the explicit constitutional obligation of Congress to approve all compacts between the States. Art. I, § 10, cl. 3, United States Constitution.

Under the blank check Congress wrote, New York and/or New Jersey could enact legislation purporting to authorize removals from waterfront union office upon return of a verdict, or even upon return of an indictment, with the specific purpose of assuring that New Jersey waterfront locals would never have to fund a § 504(d) salary escrow. Indeed, the Waterfront Commission acted against Petitioner as though such legislation were already in place.

More than twenty years after DeVeau,

this Court decided INS v. Chadha, 462 U.S. 919 (1983). Chadha made clear that Congress cannot delegate its legislative powers to coordinate branches of government. See also Metropolitan Washington Airports Authority v. Citizens for the Abatement of Air Noise, 501 U.S. 252, 276 (1991); Bowsher v. Synar, 478 U.S. 714 (1986) ("If Congress were free to delegate its policymaking authority . . . to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution'") (478 U.S. at 755, Stevens, J., concurring); United States Senate v. FTC, 463 U.S. 1216 (1983) (per curiam).

In light of the Chadha line of cases, the power of Congress to give consent to future State legislation "in furtherance" and thereby effectively altering a compact is dubious. Accordingly, this Petition presents an appropriate vehicle

for determining an important question of constitutional federalism, namely, whether Congress can delegate to the States its exclusive authority under the Compact Clause by signing a legislative blank check to the compacting States as it did when it consented to the Waterfront Commission Interstate Compact and all future State "enactments in furtherance thereof." 67 Stat. 541.

4. THIS COURT SHOULD DETERMINE WHETHER THE WATERFRONT COMMISSION ACT SHOULD BE CONSTRUED, IN PART OR IN WHOLE, AS FEDERAL LEGISLATION

The New Jersey Supreme Court has recognized that Article XV, paragraph 1, of the Waterfront Commission Interstate Compact "declares a rule of interpretation which prevents any use of the act to qualify or impede whatever right exists under New Jersey or Federal law." In re. Waterfront Commission of N.Y. Harbor (Murphy), 35 N.J. 62, 67, 171 A.2d 295, appeal dismissed & cert. denied, 368 U.S. 32 (1961).

The decision below is in conflict with Murphy, because it does allow § 8 of the Waterfront Commission Act to impede the right of Petitioner and others similarly situated to receive a § 405(d) salary escrow when removed from union office by operation of a conviction that is later reversed.

If the court below was bound to accept the rule of construction announced by New Jersey's highest court in Murphy because § 8 is a New Jersey enactment, then the Complaint should not have been dismissed under Rule 12(b)(6) because it does state a claim against the Waterfront Commission upon which relief can be granted, namely, that the Waterfront Commission acted ultra vires.

While the Third Circuit did not explicitly address the point, the Second Circuit holds the compact to be federal legislation by virtue of the grant of congressional consent. NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission, 732 F.2d 292, 298 (2d Cir.), cert. denied, 469 U.S. 852 (1984). Under this analysis, Article XV (and by DeVeau-indicated extension, all implementing State legislation, such as § 8) must be deemed federal law. However, if § 8 is to be deemed federal law, then the

Waterfront Commission cannot justify its action by reference to a decision based on State law holding return of a guilty verdict effects a conviction, when federal law defines conviction as entry of a judgment. Subsection 504(c).

From the foregoing, it is evident that there is substantial conflict and confusion regarding whether the Waterfront Commission Act, in part or in whole, is to be construed as federal or as State legislation. As this issue is of consequence in the judicial construction of all interstate compacts, it is an important issue deserving of this Court's resolution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket Number 95-5309.

Respectfully submitted,

FREDRIC J. GROSS
Attorney for Petitioner

March 26, 1996.

Appendix

Filed December 28, 1995

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-5309

DONALD CARSON, appellant

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR; GERALD P. LALLY; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ("ILA"); ATLANTIC COAST DISTRICT OF THE ILA; JOHN BOWERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1588

This case presents a Supremacy Clause challenge to New Jersey's implementation of the Waterfront Commission Act of 1953, an interstate compact between New York and New Jersey aimed at eliminating racketeering and other pernicious activities in the Port of New York District. Appellant Donald Carson contends that § 8 of that Act conflicts with a 1984 amendment

to the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. § 504(d). Finding that the 1984 amendment effected no change in Carson's rights whatsoever, we hold that his preemption claim is barred by the Supreme Court's decision in De Veau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960) (plurality opinion), which rejected a claim that § 8 conflicted with the pre-1984 version of § 504. We therefore will affirm the district court's order dismissing Carson's claims against the Waterfront Commission pursuant to Fed. R. Civ. P. 12(b)(6).

I.

Donald Carson was an officer in the International Longshoremen's Association ("ILA") and two related entities when a jury in the United States District Court for the District of New Jersey found him guilty of racketeering conspiracy in

violation of 18 U.S.C. § 1962(d), and extortion conspiracy in violation of 18 U.S.C. §§ 2 and 1951. Two days later, Gerald Lally, the General Counsel to the Waterfront Commission ("Commission"), advised John Bowers, ILA's President, that Carson's continued employment after his conviction would place the union in violation of New Jersey's enactment of section 8 of the Waterfront Commission Act ("WCA"), N.J. Stat. Ann. § 32:23-80,[1]

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1. No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within this State of New Jersey for or on behalf of any labor organization, which represents employees registered or licensed pursuant to the provisions of this act . . . if any officer . . . has been convicted by a court of the United States, or any State or territory thereof, of treason, murder, manslaughter or any felony, high misdemeanor or misdemeanor involving moral turpitude, or any crime or offense enumerated in subdivision 3(b) of section 5-

which forbids a union from operating as such in New Jersey if one of its officers has been "convicted" of certain crimes.

Bowers forwarded a copy of Lally's letter to Carson and advised him that in light of his conviction, he was suspended from his union positions. Several days later, the Commission, through Lally, advised Bowers that suspension of a convicted union officer was insufficient to comply with § 8 of the WCA. Accordingly, Bowers sent Carson another letter informing him that he was being "removed from all offices of the ILA and its affiliates and all fringe benefit funds." Letter from Bowers to Carson of 4/25/88, at 1. Carson appealed his criminal conviction,

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[footnote continued]

> n of this act, unless he has been subsequently pardoned therefor . . . .
>
> N.J. Stat. Ann. § 32:23-80.

and we vacated the judgment. United States v. Carson, 969 F.2d 1480 (3d Cir. 1992). The indictment ultimately was dismissed.

Carson brought this suit against the Commission, Lally and various ILA officials.[2] His principal claim was that by enforcing § 8 of the WCA, which required

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2. Carson's claims against the ILA officials were enjoined pursuant to a December 21, 1994, order of the United States District Court for the Southern District of New York, which had before it a massive civil RICO action against ILA and Carson. That action ultimately resulted in a judgment against Carson, and an appeal to the Court of Appeas for the Second Circuit was partially successful. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995). Both parties to that appeal have petitioned for rehearing. In the meantime, Carson had appealed separately from the Southern District's order enjoining his claims against the ILA defendants. By stipulation, however, that appeal was being held in abeyance pending the resolution of the parties' respective petitions for rehearing. The district court, therefore, granted Carson's request for an administrative termination of his claims against the ILA defendants.

his removal upon the return of a guilty verdict, the defendants conspired to deprive him of wages to which he claims convicted-but-exonerated officials are entitled under the 1984 amendment to § 504 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Section 504(d) of the LMRDA requires unions to escrow the wages of an official "barred by virtue of [that] section" and to remit those wages to the official if he is ultimately exonerated. 29 U.S.C. § 504(d). Since the escrow provision does not take effect until there is a "conviction," which § 504(c) defines as the entry of a judgment of conviction (i.e., at sentencing), Carson alleged that the Commission's action in seeking and obtaining his removal based on the state-law interpretation of the term "convic-

tion" in § 8 of the WCA (i.e., a guilty verdict) contravened the Supremacy Clause and was unlawful.

In granting the Commission's motion to dismiss for failure to state a claim, the district court disagreed. Separating its analysis into two parts, the district court first looked to whether the definition of "conviction" in § 8 of the WCA contravened the pre-1984 version of § 504 of the LMRDA, which defined "conviction" as a judgment from which no further appeals could be taken. The district court noted initially that the Supreme Court in De Veau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960) (plurality opinion), held that § 8 of the WCA was not preempted by the pre-1984 version of § 504 of the LMRDA. Then, relying on International Longshoremen's Ass'n v. Waterfront Commis-

sion, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966, 102 S. Ct. 509, 70 L. Ed. 2d 383 (1981), and Local 1804, International Longshoremen's Ass'n v. Waterfront Commission, 85 N.J. 606, 428 A.2d 1283 (N.J. 1981), the district court concluded that "it has been judicially settled that section 504(c)'s pre-1984 definition of 'conviction' did not pre-empt the viability of section 8." J. App. at 91.

The district court then turned to the current version of § 504 of the LMRDA and determined that the present definition of "conviction" under section 504(c) reads closer to the original, practical thrust of section 8. The addition of section 504(d) has not imposed additional responsibilities upon the Commission or Lally. That section does not require the

Waterfront Commission to establish and maintain an escrow account for the benefit of union officials. Therefore, neither the change of 504(c) nor the addition of 504(d) presents a significant departure from section 504 pre-1984 to invalidate section 8.

App. at 91-92. After holding that Lally, the Commission's General Counsel, was entitled to qualified immunity, the district court dismissed Carson's complaint against both the Commission and Lally. This appeal followed. Carson does not challenge the district court's qualified immunity determination in this appeal.

II.

The district court's jurisdiction was premised upon 28 U.S.C. §§ 1331, 1332 and 1367. The district court directed entry of final judgment on Carson's claims

against the Commission under Fed. R. Civ. P. 54(b). Our jurisdiction over this appeal from a final determination of the district court rests on 28 U.S.C. § 1291. We exercise plenary review over a district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

III.

The gravamen of Carson's Supremacy Clause challenge is that the 1984 amendment to § 504 of the LMRDA, which created the escrow requirement, expressed a clear congressional intent that criminally convicted union officials who are removed from office but ultimately exonerated should be entitled to their wages: "this new subsection . . . is designed to mitigate the harm of a wrongful conviction." Carson's Br. at 13. Since strict

application of New Jersey's interpretation of the term "conviction" in § 8 of the WCA operates to remove convicted union officials before § 504(d)'s escrow requirement can be triggered, Carson contends, the Supremacy Clause requires that the WCA bow to the paramount federal policy. We disagree.

A.

Carson hinges his claim on the 1984 amendment to § 504 ostensibly because the Supreme Court's decision in De Veau, 363 U.S. at 144, 80 S. Ct. at 1146, rejected a generalized claim that § 8 of the WCA was preempted by the pre-1984 version § 504 of the LMRDA and because both the Court of Appeals for the Second Circuit and the New Jersey Supreme Court, prior to 1984, rejected the very claim Carson raises here. See International Longshoremen's Ass'n v. Waterfront Comm'n,

642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966, 102 S. Ct. 509, 70 L. Ed. 2d 383 (1981); Local 1804, Int'l Longshoremen's Ass'n v. Waterfront Comm'n, 85 N.J. 606, 428 A.2d 1283 (N.J. 1981). Therefore, as a way around this rather formidable body of precedent, Carson has attempted to demonstrate an intervening change in the law which would render De Veau and its progeny inapplicable.

Carson's argument that the escrow provision added by the 1984 amendment to § 504 demonstrates a special congressional concern with "mitigating the harm of a wrongful conviction" is fatally flawed at its inception. As the district court's discussion implied, the post-1984 version of 29 U.S.C. § 504 expressed no more of a congressional intent "to mitigate the harm of a wrongful conviction" than did

the pre-1984 version. On the contrary, convicted union officials are in fact worse off after the 1984 amendment. A comparison of the former and current versions of § 504, the pertinent provisions of which we will set forth in the margin, demonstrates this conclusively.

Under the pre-1984 version of § 504,[3]

---

3. (a) Persons convicted of robbery, bribery, etc.

> No person who . . . has been convicted of, or served any part of a prison term resulting from his conviction of, [certain enumerated crimes] . . . shall serve--
>
> (1) as an officer . . . of any labor organization,
>
> . . . .
>
> during or for five years after . . . such conviction . . . .
>
> . . . .
>
> (c) Definitions
>
> For the purposes of this section, any person shall be deemed to have been "convicted" . . . from the date of the judgment of the

a union official was required to be suspended for five years upon being "convicted" of certain crimes. The statute defined "conviction" as a judgment from which no further appeals have been or could have been taken. Thus, under federal law, union officials convicted of a crime listed in § 504 could retain their positions and receive wages until such time as their appeals had been exhausted; only those officials whose convictions were upheld on appeal were required to step down. The obvious effect was that criminally convicted officials were entitled to work and receive wages during

.....

[footnote continued]

> trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event . . . .

29 U.S.C. § 504 (1982) (amended 1984 & 1987).

the pendency of their appeals irrespective of whether they were ultimately exonerated.

The 1984 amendment, however, required that convicted union officials be removed far sooner than under the previous version of § 504. Under the current version,[4] all convicted officials must be

---

4. (a) Persons convicted of robbery, bribery, etc.

> No person who . . . has been convicted of, or served any part of a prison term resulting from his conviction of, [certain enumerated crimes] . . . shall serve or be permitted to serve --
>
> . . . .
>
> (2) as an officer . . . of any labor organization,
>
> . . . .
>
> during or for the period of thirteen years after such conviction or after the end of such imprisonment, whichever is later . . . .
>
> . . . .
>
> (c) Definitions

removed from office upon entry of a judg-

[footnote continued]

> For the purpose of this section--
>
> (1) A person shall be deemed to have been "convicted" . . . from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.
>
> . . . .
>
> (d) Salary of person barred from labor organization office during appeal of conviction
>
> Whenever any person--
>
> (1) by operation of this section, has been barred from office . . . as a result of a conviction, and
>
> (2) has filed an appeal of that conviction,
>
> any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. Payment of such salary into escrow shall continue for the duration of

ment of conviction (i.e., at sentencing). See 29 U.S.C. § 504(c). If that had been the extent of the 1984 amendment, exonerated and non-exonerated officials alike no longer would have been entitled to wages during the pendency of their appeals. Therefore, Congress also added subsection (d) to § 504, requiring that

.....

[footnote continued]

> the appeal . . . . Upon the final reversal of such person's conviction on appeal, the amounts in escrow shall be paid to such person. Upon the final sustaining of such person's conviction on appeal, the amounts in escrow shall be returned to the individual employer or organization responsible for payments of those amounts. Upon final reversal of such person's conviction, such person shall no longer be barred by this statute from assuming any position from which such person was previously barred.

29 U.S.C. § 504 (1988) (as amended) (emphasis added).

unions place the wages of a convicted official into an escrow account in the event that the official ultimately is exonerated. If the official is not exonerated, the wages revert back to the union. If the official is exonerated, however, he is entitled to the wages, but, unlike the pre-1984 state of affairs, is barred from office in the interim.

Far from representing the significant, beneficial change in the rights of wrongfully convicted officials that Carson would have us ascribe to it, the escrow requirement added by the 1984 amendment simply maintains the status quo. Convicted-but-exonerated officials, both before and after 1984, are entitled to receive their wages during the pendency of their appeals. But viewed as a whole,

the 1984 amendment contained two serious drawbacks for convicted union officials: (1) non-exonerated officials no longer are entitled to their wages during appeal; and (2) exonerated officials, although entitled to wages during the pendency of their appeals, are not permitted to work during that time. Accordingly, Carson's claim that Congress' 1984 amendment to § 504 evinces a special concern with "mitigating the harm of a wrongful conviction" is inaccurate.

B.

Since the 1984 amendment worked no positive change in Carson's rights as a wrongfully convicted official, his only plausible Supremacy Clause claim is that to the extent state-court decisions define the term "conviction" in § 8 of the WCA as a verdict of guilty, that definition has always been preempted by

section 504 of the LMRDA. Indeed, prior to 1984, federal law permitted all convicted officials to remain in office until their appeals had been exhausted, which necessarily means that the conflict between § 8 and the pre-1984 version of § 504 was even more glaring. If Carson is correct, then § 8 presumably must yield to § 504 after 1984 since it should have yielded all along.

To prevail on the merits of his claim, however, Carson faces a nearly insurmountable hurdle in form of the Supreme Court's decision in De Veau, 363 U.S. at 144, 80 S. Ct. at 1146. As we noted above, De Veau specifically rejected a challenge to § 8 of the WCA as being inconsistent with the pre-1984 version of § 504 of the LMRDA, and two subsequent pre-1984 decisions, relying on De

Veau, rejected the very claim Carson advances here. There are two potential paths around De Veau and the decisions relying on it; Carson urges that we follow both. We consider each one in turn.

1.

Carson implies that De Veau should not apply here because it was decided in 1960 and it was not until 1981 that state and federal courts began to interpret the term "conviction" in § 8 of the WCA to mean a guilty verdict. See, e.g., International Longshoremen's Ass'n, 642 F.2d at 666; Local 1804, 428 A.2d at 1283. Thus, the argument continues, De Veau could not have foreclosed a claim of inconsistency between § 8 of the WCA and § 504 that was essentially unforeseeable in 1960. While this argument has some logical appeal, De Veau's broad rationale requires that we reject it.

De Veau was a declaratory judgment action in which the plaintiffs alleged that § 8 of the WCA, through its rather severe disqualification provisions, unduly interfered with their rights under the National Labor Relations Act ("NLRA") to choose bargaining representatives. Plaintiffs also alleged that § 8's disqualification provisions were harsher than those contained in § 504 of the LMRDA and, thus, the former was impliedly preempted by the latter. (The most glaring inconsistency was that § 8 provided for a lifetime bar of convicted officials whereas § 504 required only a five-year disqualification.) After exhaustively tracing the developments leading to the submission to and approval by Congress of the WCA and its enactment by the New York and New Jersey legislatures, Justice

Frankfurter, writing for the plurality, rejected the preemption claim regarding the NLRA. He did so on the ground that Congress, in approving the WCA, had expressly consented to supplemental legislation like § 8 even though it technically was not part of the compact. De Veau, 363 U.S. at 150-54, 80 S. Ct. at 1150-51.

Turning to the plaintiffs' contention that § 8 conflicted with the federal policy codified in § 504 of the LMRDA, Justice Frankfurter observed two separate reasons strongly militating against a finding of preemption. The first was that

> Congress itself has . . . imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualification of ex-felons for union office[.

> That] is surely evidence that Congress does not view such a restriction as incompatible with its labor policies.

Id. at 156, 80 S. Ct. at 1152. Significantly, the general policy of excluding convicted officials, not specific claimed inconsistencies, was the focus of the High Court's preemption analysis. Responding to the plaintiffs' specific contention that "any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504(a), is impliedly barred by it," id., Justice Frankfurter concluded that

> just the opposite conclusion is indicated by the 1959 Act, which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress

> meant pre-emption to flow from the 1959 Act it expressly so provided. Sections 205(c) and 403 . . . are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504[a]. That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the [WCA].

Id. at 156, 80 S. Ct. at 1152-53 (emphasis added). The plurality then cited to a provision in the LMRDA that, in its view, expressed a clear congressional intent to allow state legislation such as § 8 of the WCA:

> And to make the matter conclusive, § 603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act. . . . In view of this explicit

> and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504(a).

Id. at 157, 80 S. Ct. at 1153.

The ratio decidendi of the De Veau plurality's decision is that § 8 and § 504(a) are compatible precisely because they both are aimed at removing criminal elements from union office; any friction between the two is constitutionally permissible because § 504 lacks specific preemption language. We understand De Veau, therefore, to reject a "facial" challenge to any and all claimed inconsistencies between § 8 of the WCA and § 504 of the LMRDA. Standing alone, this would appear to mandate an affirmance since no preemption language has been added to section 504 since De Veau was decided.

Carson urges, however, that to the extent that De Veau's holding purports to bar any prospective claim of inconsistency between § 8 of the WCA and § 504 of the LMRDA, it was a plurality opinion and, thus, De Veau and its progeny do not stand as a per se bar to his preemption claim. While this argument also has some measure of surface appeal, after reading Justice Brennan's opinion concurring in the judgment, we are not persuaded.

We would agree with Carson had Justice Brennan refused to join Justice Frankfurter's opinion because he believed that its reliance on the lack of express preemption language would needlessly bring within its sweep all future claims of inconsistency between § 8 and § 504 and impliedly reject them. But that is

not why Justice Brennan wrote separately. On the contrary, Justice Brennan agreed with the plurality's result precisely because Congress expressly had consented to parallel state legislation in enacting the LMRDA:

> Mr. Justice BRENNAN is of the opinion that . . . the [LMRDA] explicitly provides that it shall not displace such legislation of the States. He believes that New York's disqualifications of ex-felons from waterfront union office, on all the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate state aim . . . .

De Veau, 363 U.S. at 160-61, 80 S. Ct. at 1155 (Brennan, J., concurring in the judgment). This language essentially mirrors the second reason Justice Frankfurter offered for finding that § 504 did not preempt § 8.

Justice Brennan's concurrence suggests at most a disagreement with the plurality's methodology in rejecting the plaintiff's initial contention that § 8 was preempted by the NLRA. By noting that the LMRDA itself was sufficient evidence of a congressional intent not to preempt § 8, Justice Brennan implied that there was no need to conclude, as had the plurality, that in approving the WCA Congress gave its express imprimatur to state legislation like § 8 (which was not technically part of the compact). Because the NLRA is not offered as a basis for preemption in this case, the concurrence's differences with the plurality on that issue are irrelevant. Quite simply, five Justices agreed in De Veau that in enacting the LMRDA in 1959, Congress explicitly assented to the

enactment of parallel state restrictions on convicted union workers except where it expressly had provided to the contrary. Accordingly, Carson's claim that De Veau lacks precedential value because it was a plurality opinion is without merit.

Finally, we observe that in 1984 the Supreme Court specifically reaffirmed De Veau's basic premise that the LMRDA expressed a clear congressional intent not to preempt state regulation of union officials. Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 506, 104 S. Ct. 3179, 3188, 82 L. Ed. 2d 373 (1984) ("[Section] 504 itself makes clear that Congress did not seek to impose a uniform federal standard on those who may serve as union officials."). Although Brown dealt with a claim that New Jersey's regulation of

unions in the casino industry conflicted with the NLRA, much of the Brown Court's analysis was devoted to comparing New Jersey's regulatory scheme to the New York version of § 8 of the WCA scrutinized in De Veau. In the process, Brown reaffirmed De Veau's refusal to find § 8 preempted by federal labor policy. Since De Veau controls, we conclude that Congress' refusal to add any specific preemption language to § 504 since De Veau was decided compels an affirmance.

The district court's order of April 7, 1995, dismissing Carson's claims against the Waterfront Commission will be affirmed.

LETTER ORDER

ORIGINAL ON FILE WITH CLERK OF THE COURT

Re: Carson v. Waterfront Commission
Civil Action No. 94-1594 (WHW)

Dear Counsel:

Defendants Waterfront Commission of New York Harbor (Commission) and Gerald P. Lally (Lally), General Counsel of the Commission, move to dismiss the plaintiff's Complaint pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Defendants International Longshoremen's Association, which includes Local 1588 and the Atlantic Coast Division of the ILA, also filed motions to dismiss the plaintiff's Complaint. A December 21, 1994 Order of

the District Court for the Southern District of New York, however, enjoins Plaintiff Carson from now prosecuting the pending action in the District of New Jersey against said union entities. Plaintiff concedes that that order is a present bar to litigation against the union entities. The motions to dismiss by the unions are therefore stayed.

STATEMENT OF FACTS

Plaintiff Carson was an executive vice president of the international Longshoremen's Association (ILA), a general organizer of the Atlantic Court District, ILA, secretary-treasurer and business Agent of Local 1588, ILA and a trustee of various joint labor management funds. On April 16, 1988, a jury returned a verdict against plaintiff

Carson for one count of racketeering conspiracy and one count of extortion conspiracy. On April 18, 1988, defendant Lally, on behalf of the Commission, demanded the termination of plaintiff's employment pursuant to the Waterfront Commission Act (WCA) Section 8. By letter of that date, Lally wrote John Bowers, President of the ILA, informing him that plaintiff Carson should be terminated pursuant to Section 8.

Bowers terminated plaintiff by an April 25, 1988 letter.

In December 1992, the Court of Appeals for the Third Circuit vacated plaintiff's conviction and remanded the case to the District Court of New Jersey for further proceedings. The United States decided not to pursue the action;

the indictment was dismissed in January 1993.

Plaintiff is suing the Commission and Lally alleging conspiracy to deprive him of his right to pursue a trade and his right to lost salary under 29 U.S.C. section 504, without due process of law as well as claiming abuse of discretion in terminating plaintiff's employment.

WATERFRONT COMMISSION ACT SECTION 8 & 22 U.S.C. SECTION 504

Section 8 of the Waterfront Commission Act reads:

> No person who has been convicted of a crime or offense specified in section 8 of this act (footnote omitted) shall directly or indirectly serve as an officer, agent or employee of a labor organization, welfare fund or trust as defined in section 8 and within the meaning thereof unless such

person has been subsequently pardoned for such crime or offense by the Governor or other appropriate authority of the State or jurisdiction ... "

N.J.S.A. 32:23-80.2

Section 504 of 29 U.S.C., as amended in 1984, reads in pertinent part:

(a) . . . [P]ersons convicted of robbery, bribery, etc.

No person . . . who has been convicted of . . . [one of the listed crimes] shall serve or be permitted to serve- . . .
(2) as an officer . . . in any capacity of any labor organization, . . .

* * *

(c) Definitions

For the purpose of this section-
(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

* * *

(d) Salary of office or position of persons convicted placed in escrow

Whenever any person-

(1) by operation of this section, has been barred from office or other position in a labor organization as a result of a conviction, and

(2)has filed an appeal of that conviction,

any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary.

MEANING OF "CONVICTION UNDER SECTION 8

A person is "convicted" under section 8 of the WCA when a jury verdict is rendered against that individual or when that person enters a guilty plea to a charge. See Local 1804 International Longshoremen's, Ass'n, AFL-CIO v, Waterfront Commission of New York Harbor, 171 N.J.Super 508, 511, 410 A.2d 73, 75

(App.Div. 1979), aff'd, 85 N.J. 606, 428 A.2d 1283 (1981) (holding that "[i]t is therefore clear that the Legislature, in prohibiting those 'convicted' of certain crimes from holding union office, intended to include all those against them a verdict of guilt has been returned, notwithstanding their appeal from conviction."). See also Local 1804, International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission of New York Harbor, 642 F.2d 666, 671 (2d Cir. 1981), cert. denied, 454 U.S. 966 (1981)(finding that "[t]he district court correctly predicted that, when the New York courts were asked to determine when a 'conviction' occurs under the statute, they would hold that it occurs when there is a guilty plea or verdict, not, as

plaintiffs urge, when all appeals are exhausted.").

SECTION 8 IS NOT PRE-EMPTED BY FEDERAL LAW

Plaintiff argues that section 8 conflicts with sections 504(c) and (d) and is therefore pre-empted by the federal law.

This Court relies on DeVeau v. Braisted, 363 U.S. 144 (1960), reh'g denied, 364 U.S. 856 (1960), to determine the issue. In DeVeau, a union official argued that WCA section 8 was in conflict with 29 U.S.C. section 504 and, therefore, the Supremacy Clause would require federal law to preempt section 8. The Supreme Court disagreed, reasoning that criminal activity was a long-standing problem on the waterfront and

the need to eliminate such activity great. 363 U.S. at 167-168. The Court explained:

> Legislative investigation had established that the presence of ex-convicts on the waterfront was not a minor episode but constituted a principal corrupting influence. The Senate Subcommittee which investigated for Congress conditions on the New York waterfront found that "(c)riminals whose long records belie any suggestion that they can be reformed have been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Under their regimes gambling, the narcotics traffic, loansharking, shortganging, payroll 'phantoms,' the 'shakedown' in all its forms--and the brutal ultimate of murder--have flourished, often virtually unchecked."

363 U.S. at 157-58 (citing S.Rep. No 653, 83d Cong., 1st Sess. (1953), p7). The Court found that section 8 prevailed because of the extent of corruption on the waterfront and because there was no

pre-emption provision provided in section 504 363 U.S. at 156-59.

SECTION 8'S DEFINITION OF 'CONVICTION' IS NOT PRE-EMPTED BY FEDERAL LAW

Before the 1984 Amendment, section 504(c)a defined "conviction" to include the exhaustion of all appeals. International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission of New York Harbor, 495 F.Supp. 1101, 1114-15 (S.D.N.Y. 1990), aff'd in part, rev'd in part, 642 F.2d 666 (2d Cir. 1981) cert. denied, 454 U.S. 966 (1981). To resolve the apparent conflict between the "immediate" disqualification of section 8 and the possible "delayed trigger" of then section 504, courts relied on DeVeau and found that federal law did not preempt section 8.

In International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission of New York Harbor, 642 F.2d 666 (2d Cir. 1981), The Court of Appeals for the Second Circuit, following DeVeau, concluded that the definitions of "conviction" in section 8 and section 504(c) "are not so incompatible as to require a finding of federal preemption." 642 F.2d at 671.

The highest court of New Jersey, the other bordering state of New York Harbor, has reached the same conclusion. In Local 1804, International Longshoremen's Ass'n. AFL-CIO v. Waterfront Commission of New York Harbor, 85 N.J. 606, 428 A.2d 1283 (1981), the Supreme Court of New Jersey explained that "[r]emoving criminal elements from the waterfront in New York and New

Jersey" was a compelling state interest "recognized by both Congress and the United States Supreme Court" as weighing "heavily against preemption." 85 N.J. at 613, 428 A.2d at 1287.

It has been judicially settled that section 504(c)'s pre-1984 definition of "conviction" did not pre-empt the viability of section 8.

29 U.S.C. SECTION 504 AS AMENDED

Since the 1984 Amendment, section 504(c) has been rewritten and section 504(d) has been added. The present definition of "conviction" under 504(c) reads closer to the original, practical thrust of section 8. The addition of 504(d) has not imposed additional responsibilities upon the Commission or Lally. That section does

not require the Waterfront Commission to establish and maintain an escrow account for the benefit of union officials. Therefore, neither the change of 504(c) nor the addition of 504(d) presents a significant departure from section 504 pre-1984 to invalidate section 8.

QUALIFIED IMMUNITY

This Court further finds that Lally, the attorney for the Waterfront Commission, is shielded by qualified immunity as an official whose conduct did not clearly violate "established statutory or constitutional rights" of the plaintiff. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Lally's letters to the union were lawful. Carson was removed not because of the commission or

Lally but because of the force of section 8.

CONCLUSION

For the reasons set forth in this Letter Opinion, it is on this 14th day of February 1995

ORDERED that Plaintiff Carson's claims against defendants Commission and Lally's be and hereby are **dismissed** for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6).

Further, pursuant to 28 U.S.C.A. section 1292(b), the Court is of the opinion that the subject matter of this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and therefore an immediate

appeal thereof may materially advance the ultimate termination of this litigation.

s/ WILLIAM WALLS, U.S.D.J.

(2)

No. 95-1565

Supreme Court, U.S.
FILED
APR 18 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DONALD CARSON,

Petitioner,

versus

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WATERFRONT COMMISSION OF NEW YORK HARBOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. The Respondent Waterfront Commission of New York Harbor (Commission) and its Powers

The Commission is a body corporate and politic and an instrumentality of the States of New Jersey and New York (New Jersey Laws of 1953, c.202 (N.J.S.A. 32:23-1 and following); New York Laws of 1953, c. 882 (McK. Unconsol. Laws §9801 and following), approved by Congress of the United States (Public Law 252, c.407, 83rd. Cong. 1st. Sess.)) created for the purpose of eliminating racketeering, and other criminal, corrupt and evil conditions on the waterfront in the Port of New York District.

To combat the various waterfront evils, the Commission is empowered to, among other things, register longshoremen (N.J.S.A. 32:23-27), checkers (N.J.S.A. 32:23-105) and telecommunications system controllers (N.J.S.A. 32:23-105.1) and license pier superintendents and hiring agents (N.J.S.A. 32:23-12), stevedores (N.J.S.A. 32:23-19) and port watchmen (N.J.S.A. 32:23-39).

The Commission is vested with authority by N.J.S.A. 32:23-80; N.J.S.A. 32:23-80.2 (WCA §8) to remove any "officer, agent or employee" of a waterfront labor organization described in N.J.S.A. 32:23-80 or of "a welfare fund or trust administered partially or entirely by such labor organization" if that person "has been *convicted* by a court of the United States, or any State or territory thereof, of treason, murder, manslaughter or any felony, high misdemeanor or misdemeanor involving moral turpitude, or any crime or offense enumerated in *** [N.J.S.A. 32:23-105]." (Emphasis added).

N.J.S.A. 32:23-80 and 80.2 comprise Section 8 and Section 8-b of the Waterfront Commission Act. New York's counterpart

of WCA §8 is substantially similar and is contained in McK. Unconsol. Laws §9933.

In substance, N.J.S.A. 32:23-80 prohibits the collection of dues by a waterfront labor union as long as the "convicted" union officer, agent or employee remains in office. N.J.S.A. 32:23-80.2 contains a direct prohibition against the "convicted" individual from remaining in office and a prohibition against the labor organization, welfare fund or trust from knowingly permitting the "convicted" person to "assume or hold any office, agency or employment." N.J.S.A. 32:23-80.2 also empowers the Commission to enforce WCA §8 by an appropriate civil action. A violation of WCA §8 is also a misdemeanor punishable by a fine of $500.00 or imprisonment for one year, or both. N.J.S.A. 32:23-80, 80.2.

B. The petitioner Donald Carson (Carson)

Up until late April 1988, Carson was an Executive Vice President of the International Longshoremen's Association (ILA), a General Organizer of the Atlantic Court District, ILA, Secretary-Treasurer and Business Agent of Local 1588, ILA and a Trustee of various joint labor-management funds. On April 16, 1988, a jury returned a verdict against Carson in the United States District Court of New Jersey of one count of racketeering conspiracy in violation of 18 U.S.C. §1962(d) and one count of extortion conspiracy in violation of 18 U.S.C. §1951 and 18 U.S.C. §2.

C. The Instant Controversy

In a letter dated April 18, 1988, Gerald P. Lally, the Commission's General Counsel, on behalf of the Commission, advised John Bowers, the ILA's President, that in view of Carson's convictions, he (Carson) was in violation of WCA §8 and, accordingly, should be removed immediately from all union and trust-fund positions. By letter dated April 19, 1988, Bowers, on

behalf of the ILA, forwarded a copy of Lally's letter to Carson, noted the prohibitions contained in WCA §8, as well as in 29 U.S.C. §504 and suspended Carson from the union positions. In a subsequent letter dated April 29, 1988, Bowers, on behalf of the ILA, informed Carson that he (Bowers) was advised by the Commission that a suspension of a convicted officer does not satisfy WCA §8 and therefore Carson is "removed from all offices of the ILA and its affiliates and all fringe benefit funds." Carson's conviction was subsequently vacated, but not on the merits. *U.S.* v. *Carson,* 969 F. 2d 1480 (3rd. Cir. 1992).

D. Proceedings Below

Carson instituted suit in the United States District Court for the District of New Jersey against the Commission, Lally, the three ILA union entities and Bowers. Reduced to its essentials, Carson's complaint alleged that he was wrongfully deprived of escrow benefits conferred by 29 U.S.C. §504(d), in that he was prematurely removed by the Commission from union office by the Commission shortly after the return against him of a jury verdict of guilty on felony charges in the District Court of New Jersey. Carson maintained that the Commission improperly acted prior to the entry of a judgment of conviction within the meaning of 29 U.S.C. 504(c)(l). Lally was sued in his individual capacity.

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was made by the Commission and Lally as well as the other defendants. The application of the Commission and Lally was granted and Carson's complaint against them was dismissed by the District Court. The District Court ruled that Lally enjoyed qualified immunity. Carson's action against the remaining defendants was administratively terminated (Carson Appendix, pp. 31-46). (Carson had been restrained from proceeding against these defendants by Order of the United States District Court for the Southern District of

New York entered in *United States* v. *Local 1804-1. et als.*, Docket No. 90 Civ. 0963 (JSM).)

Upon Carson's appeal as to the Commission only, the Third Circuit unanimously affirmed the New Jersey District Court's Order of Dismissal (Carson Appendix, pp. 1-31). Carson did not appeal the District Court's Order of Dismissal in respect to Lally and no claim concerning Lally is raised by Carson in the instant Petition.

REASONS FOR DENYING THE WRIT

The Waterfront Commission Compact and WCA §8 were expressly approved by Congress in 1953. Carson argues at pp. 23-26 of his Petition that Congress improperly signed a legislative "blank check" when it gave its consent to the Waterfront Commission Compact "and enactments in furtherance thereof." The very foundation of this argument is flawed in that WCA §8 had already been enacted by New Jersey and New York and was before Congress in 1953. Moreover, Congressional authorization of future State enactments to an interstate compact is not unique to the Waterfront Commission Compact. *See Courtesy Sandwich Shop. Inc.* v. *Port of New York Authority,* 12 N.Y. 2d 379, 391, 240 N.Y.S. 2d 1, 7 (1963), appeal dismissed, 375 U.S. 78, 84 S. Ct. 194 (1963), rehearing denied, 375 U.S. 960, 84 S. Ct. 440 (1963).

As stated by this Court in *De Veau* v. *Braisted,* 363 U.S. 144, 80 S. Ct. 1146 (1960):

> *** Although § 8 *** was *** not formally submitted as part of the compact to Congress, in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting

> consent "[t]hat the consent of Congress is hereby given to the compact set forth * * * and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."
>
> In giving this authorization Congress was fully mindful of the specific provisions of § 8. Not only had § 8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International Longshoremen's Association, as a ground of opposition to congressional consent, that approval of the compact by Congress would carry with it sanction of § 8. See Hearing before Sub-committee No. 3 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st Sess., on H.R.6286, H.R.6321, H.R.6343, and S.2383, p. 136.
>
> (363 U.S. at 150-151; 80 S. Ct. at 1150)

This Court in *De Veau* expressly rejected a contention that WCA § 8 was preempted by 29 USC § 504(a):

> Appellant, however, argues that any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504(a), is impliedly barred by it. Just the opposite conclusion is indicated by the 1959 Act, which reflects Congressional awareness of the problems of preemption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the 1959 Act it expressly so provided.

Sections 205(c) and 403, set out in the margin, are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504(a). That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the Waterfront Commission Act. In addition, two sections of the 1959 Act, both relevant in this case, affirmatively preserve the operation of state laws.

That § 504(a) was not to restrict state criminal law enforcement regarding the felonies there enumerated as federal bars to union office is provided by § 604 of the 1959 Act: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violations, which are listed in § 504(a)]." And to make the matter conclusive, § 603(a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such preemption is expressly provided in the 1959 Act. Section 603(a) provides: "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization * * * under the laws of any State * * *." In view of this explicit and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504(a).

(363 U.S. at 156-157, 80 S. Ct. 1152-1153)

See also *Brown* v. *Hotel & Restaurant Employees & Bartenders*, 468 U.S. 491, 104 S. Ct. 3179 (1984).

Approximately two decades after *De Veau* dispatched arguments that WCA § 8 was preempted by 29 U.S.C. § 504, proceedings were instituted by various criminally convicted waterfront union officials in State and Federal Courts in New York and New Jersey wherein they advanced claims that the Commission's attempts to invoke the provisions of WCA §8 against them, upon their convictions at the trial court level, were preempted by 29 U.S.C. § 504(c). At that time (prior to 1984) 29 U.S.C. § 504(c) defined conviction as of the "date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event." Under 29 U.S.C. § 504(c) prior to its 1984 amendment, both a convicted union official who was eventually exonerated on appeal and a convicted union official whose guilt was upheld on appeal could remain in office until the appeals were exhausted. The Commission claimed that WCA § 8 required removal of waterfront union officials upon conviction at the trial court level and notwithstanding the pendency of any appeals.

The Commission's position was uniformly upheld. Thus, State and Federal Courts in both New Jersey and New York have squarely held that an individual is convicted within the meaning of that term contained in WCA §8 *at the time a jury verdict is rendered against that individual or when that person enters a guilty plea to a charge.* In *Local 1804, Longshore. Ass'n* v. *Waterfront Commission*, 171 N.J. Super. 508 (App. Div. 1979), aff'd., 85 N.J. 606 (1981), New Jersey's Appellate Division was asked "to determine whether the disqualification to hold office because of a conviction of a crime provided by §8 of the Waterfront Commission Act, N.J.S.A. 32:23-80 and N.J.S.A. 33:23-80.2 occurs upon conviction in the trial court or only after affirmance on appeal." The Appellate Division unquestionably held:

New Jersey courts have consistently held that a "conviction" occurs at the trial level when the court accepts a guilty plea or a jury returns a verdict of guilty. *State* v. *Compton*, 28 N.J. Super. 45, 48 (App. Div. 1953); *State* v. *Rios*, 155 N.J. Super. 11, 15 (Law Div. 1977). In distinguishing the terms "conviction" and "sentence," the court in *State* v. *Henson*, 66 N.J.L. (37 Vroom) 601 (E. & A. 1901), noted:

> The ordinary legal meaning of "conviction," when used to designate a particular state of a prosecution triable by a jury, is the confession of the accused, in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt [at 607, quoting *Commonwealth* v. *Lockwood*, 109 Mass. 323 (1872)]

It is therefore clear that the Legislature, in prohibiting those "convicted" of certain crimes from holding union office, intended to include all those against them a verdict of guilt has been returned, notwithstanding their appeal from conviction.

***When a union official has been found guilty of one of the crimes enumerated in §8, he forfeits his right to the trust and confidence of the membership.

*** it is evident the Legislature intended that a union official forfeit his office immediately upon a conviction at trial and not allow him to hold office during what may be lengthy appellate proceedings.

(171 N.J. Super. at 511 - 513)

In addition, the Appellate Division refused to be guided by 29 U.S.C. §504. The New Jersey Supreme Court, in affirming the determination of the Appellate Division, squarely held that LMRDA §504 (29 U.S.C. §504) does not pre-empt the interpretation of WCA §8 that "convicted" in WCA §8 means upon conviction in the trial court. Said the New Jersey Supreme Court at 613-614:

> Removing criminal elements from the waterfront in New York and New Jersey is a peculiarly local problem in which each state has a compelling interest. *De Veau, supra,* 363 U.S. at 154, 80 S.Ct. at 1151. That conclusion, recognized by both Congress and the United States Supreme Court, weighs heavily against preemption. In addition, congressional willingness to tolerate some interference with LMRDA is manifest from the unique consent clause in the Waterfront Commission compact and the specific disclaimers of preemption contained in LMRDA §§ 603 (a) and 604. Id. at 156, 80 S.Ct. at 1152. In *De Veau* Justice Frankfurter described LMRDA § 603(a) as "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials...." Id. at 157, 80 S.Ct. at 1153.
>
> *More important, in giving its consent to the compact, Congress did not merely remain silent regarding supplementary legislation such as section 8. As indicated above, Congress formally consented to state supplementary legislation, a consent which Justice Frankfurter found "to be unique in the history of compacts."* Id. at 154, 80 S.Ct. at 1151. In addition, in determining the extent to which Congress was willing to accept the sanctions of section 8, it is enlightening to

recall that the ILA voiced objections during congressional subcommittee hearings that section 8 unduly interfered with federal labor policy. Notwithstanding that contention, *Congress expressly consented to the enactment of implementing legislation not part of the compact such as section 8.* Id. at 151, 80 S.Ct. at 1150. In light of this Court's finding in *Hazleton* v. *Murray, supra,* that the presence of criminal elements in waterfront labor organizations prevented free collective bargaining, it would be ironic as well as inconsistent to hold that the disqualification from office of a labor official convicted of a high misdemeanor contravenes federal labor policy. Judge Sofaer of the Southern District of New York reached the same result, stating:

> In light of the special circumstances presented by waterfront union corruption, and given Congress' unique response approving the Compact with its enabling clause, it seems clear that Congress would tolerate if not command WCA § 8's requirement that union officers resign or be removed before appeals are final, even though it is a departure from the federal rule. [495 F. Supp. at 1124-1125].
>
> (Emphasis added)

The identical issue was raised in *Scotto* v. *Waterfront Comm'n. of N.Y. Harbor*, (Sup. Ct., Sept. 19, 1980), aff'd o.b., 78 A.D. 2d 686, 434 N.Y.S. 2d. 1004 (App. Div. 1980), lv. to appeal denied, 50 N.Y. 2d. 709, 434 N.Y.S.2d 1025 (1980). In

that case, Justice Scholnick of the Kings County Supreme Court concluded in an exhaustive opinion *:

> 1. The term "convicted" as it appears in Section 8 of the Waterfront Commission Act (McK. Unconsolidated Laws, §9933), is to be construed in accordance with the meaning of "conviction" under New York Law, and not Federal Law, namely, upon the entry of a plea of guilty or *upon the return of a verdict of guilty at the trial court level, and not after exhaustion of all appeals.*

The Court also held that this interpretation is not "offensive to our national labor policy." Slip opinion at p.44.

Moreover, the Second Circuit in *International Longshoremen's Association* v. *Waterfront Commission*, 642 F.2d 666 (2d. Cir. 1981), *cert.* den. 454 U.S. 966, 102 S. Ct. 509 (1981), clearly announced with respect to the meaning of the term conviction in WCA §8:

> Plaintiffs' remaining arguments were rejected by the district court for reasons with which we are in substantial accord. The district court correctly predicted that, when the New York courts were asked to determine when a "conviction" occurs under the statute, they would hold that it occurs when there is a guilty plea or verdict, not, as plaintiffs urge, when all appeals are exhausted. See *Scotto* v. *Waterfront Commission*, No. 5580/80 (Sup. Ct. Sept. 19, 1980), aff'd, 78 A.D. 2d 686, 434 N.Y.S. 2d 1004 (App. Div. 2d Dep't. 1980), leave to appeal denied, 51 N.Y. 2d 709, 434 N.Y.S. 2d__, 415 N.E. 2d 984 (1980). The district court did not err in adopting the

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* Copies of this Opinion have been lodged with the Clerk's Office.

> definition it believed that New York courts would apply. The definitions of "conviction" under New York law and section 504(c) of the Labor-Management Reporting and Disclosure Act are not so incompatible as to require a finding of federal preemption. See *De Veau* v. *Braisted, supra*, 363 U.S. at 154-57, 80 S. Ct. at 1151-53; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 156, 62 S. Ct. 491, 495, 86 L. Ed. 754 (1942); *Fitzgerald* v. *Catherwood*, 388 F. 2d 400, 402-06 (2d Cir.), *cert. denied*, 391 U.S. 934, 88 S. Ct. 1846, 20 L. Ed 2d 854 (1968).
>
> (642 F.2d at 671)

See also the Southern District of New York's opinion in *International Longshoremen's Association* v. *Waterfront Commission*, 495 F. Supp. 1101, 1114-1117 (S.D.N.Y. 1980).

Against this formidable backdrop of precedent, two days after a jury returned a guilty verdict against Carson in the United States District Court for the District of New Jersey in April 1988, the Commission, by its General Counsel, sent letters to Carson and the involved waterfront unions advising that Carson's continuance in office was in violation of WCA § 8. Carson's claim that he was *singled out* for WCA § 8 removal prior to sentencing is belied by the fact that in 1988 the Commission had the benefit of the *Local 1804* and *Scotto* cases, as well as the determination of the Second Circuit in *International Longshoremen's Association* v. *Waterfront Commission.* See pp. 7-11 above. Those cases, which predated the 1988 WCA § 8 removal of Carson by many years, as noted, uniformly held that "conviction" under WCA § 8 occurs upon the entry of a plea of guilty or upon the return of a guilty verdict at the trial court level.

Moreover, Carson's argument that his removal from union office shortly after the return of the jury verdict unlawfully

deprived him of 1984 enacted 29 U.S.C. § 504(d) escrow benefits is seriously flawed on several grounds.

First, it must be emphasized that there could be no wrongful interference with any rights established by 29 U.S.C. §504(d) since no rights *ever* inured to Carson under that provision. Thus, 29 U.S.C. 504(d) provides in relevant part:

> "Whenever any person
>
> (1) *by operation of this section. has been barred from office or other position in a labor organization as a result of a conviction*, and
>
> (2) has filed an appeal of that conviction,
>
> any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. ***"
>
> (Emphasis added)

Clearly Carson was barred from his positions in the waterfront unions *solely* by virtue of WCA §8. Since this bar did not arise "by operation of" 29 U.S.C. §504, no escrow obligation ever arose under 29 U.S.C. §504(d) or will arise thereunder. It is therefore difficult to fathom how the Commission's advising the unions of the requirements of WCA § 8 at the proper time interfered with any purported obligation on behalf of these unions to escrow. In addition, since the Commission was not Carson's individual employer, "or the organization responsible for the payment of *** [his] salary," the Commission was not required to establish any escrow fund for him.

Even if the Commission's letters and the resulting discharge of Carson from union office by the ILA's President somehow prevented or interfered with the triggering of the 29 U.S.C. § 504(d) escrow, the Commission did nothing more than

lawfully comply with WCA § 8. WCA § 8 is no more preempted by the 29 U.S.C. § 504(d) escrow provision than it (WCA § 8) had been by 29 U.S.C. § 504 prior to its 1984 amendment. See *International Longshoremen's Association* v. *Waterfront Commission, supra.*

Thus, as stated by the Third Circuit in this case, the 1984 amendment to § 504 establishing the escrow did not give Carson, who was later "exonerated", any greater rights than he would have had prior to the 1984 amendment:

> Carson's argument that the escrow provision added by the 1984 amendment to § 504 demonstrates a special congressional concern with "mitigat[ing] the harm of a wrongful conviction" is fatally flawed at its inception. As the district court's discussion implied, the post-1984 version of 29 U.S.C. § 504 expressed no more of a congressional intent "to mitigate the harm of a wrongful conviction" than did the pre-1984 version. On the contrary, convicted union officials are in fact worse off after the 1984 amendment.
>
> ***
>
> Far from representing the significant beneficial change in the rights of wrongfully convicted officials that Carson would have us ascribe to it, the escrow requirement added by the 1984 amendment simply maintains the status quo. Convicted-but-exonerated officials, both before and after 1984, are entitled to receive their wages during the pendency of their appeals. But viewed as a whole, the 1984 amendment contained two serious drawbacks for convicted union officials: (1) non-exonerated officials no longer are entitled to their wages during appeal; and (2) exonerated officials, although entitled to wages during the

> pendency of their appeals, are not permitted to work during that time. Accordingly, Carson's claim that Congress' 1984 amendment to § 504 evinces a special concern with "mitigat[ing] the harm of a wrongful conviction" is inaccurate.
>
> (73 F. 3rd at 27-28)

Relying on *De Veau*, the Third Circuit reconfirmed that WCA § 8 is not preempted by 29 U.S.C. § 504:

> The *ratio decidendi* of the *De Veau* plurality's decision is that § 8 and § 504(a) are compatible precisely because they both are aimed at removing criminal elements from union office; any friction between the two is constitutionally permissible because § 504 lacks specific preemption language. We understand *De Veau*, therefore, to reject a "facial" challenge to any and all claimed inconsistencies between § 8 of the WCA and § 504 of the LMRDA. Standing alone, this would appear to mandate an affirmance since no preemption language has been added to section 504 since *De Veau* was decided.*
>
> * * *
>
> Finally, we observe that in 1984 the Supreme Court specifically reaffirmed *De Veau's* basic premise that the LMDRA expressed a clear congressional intent not to preempt state regulation of union officials. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54,*

* Congress was indeed aware of the judicial construction of the term "convicted" as contained in WCA § 8. See the statement of Nicholas Scoppetta, Waterfront Commissioner, before the Senate Subcom. on Investigations at pp. 325-326 (February 18, 1981).

> 468 U.S. 491, 506, 104 S. Ct. 3179, 3188 (1984) ("[Section] 504 itself makes clear that Congress did not seek to impose a uniform federal standard on those who may serve as union officials."). Although *Brown* dealt with a claim that New Jersey's regulation of unions in the casino industry conflicted with the NLRA, much of the *Brown* Court's analysis was devoted to comparing New Jersey's regulatory scheme to the New York version of § 8 of the WCA scrutinized in *De Veau*. In the process, *Brown* reaffirmed *De Veau's* refusal to find § 8 preempted by federal labor policy. Since *De Veau* controls, we conclude that Congress' refusal to add any specific preemption language to § 504 since *De Veau* was decided compels an affirmance.
>
> (73 F. 3rd at 29-30)

In view of the foregoing, it is clear that *De Veau* remains valid law. The 1984 amendment to 29 U.S.C. § 504 has not preempted WCA § 8. Even if WCA § 8 is deemed federal law (Carson Petition, pp. 27-29), it has not in any way been repealed by necessary implication by the 1984 amendment to 29 U.S.C. 504, *Rodriguez* v. *U.S.*, 480 U.S. 523, 107 S. Ct. 1391, 1392 (1987).

CONCLUSION

For the foregoing reasons, the respondent Waterfront Commission of New York Harbor prays that the Petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Third Circuit in this case be denied.

Dated: April 18, 1996

Respectfully submitted,

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Docket No. 95-1565

In the Supreme Court
of the United States

October Term 1995

DONALD CARSON, Petitioner,

- versus -

WATERFRONT COMMISSION OF NEW YORK HARBOR, Respondent.

REPLY TO THE OPPOSITION

TO THE PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit to review its judgment at Docket Number 95-5309

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1996

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REPLY TO THE OPPOSITION TO CERTIORARI

1. The § 504(d) salary escrows would have been established but for the Waterfront Commission's interference. Respondent makes the curious argument that because it interfered with the establishment of § 504(d) salary escrows by forcing Mr. Carson's removal from office shortly before the triggering event of sentencing, "no rights ever inured to Carson under that provision." Respondent's Opposition ("Opp.") 13.

> Clearly, Carson was barred from his positions in the waterfront unions solely by virtue of WCA § 8. Since this bar did not arise "by operation of" 29 U.S.C. § 504, no escrow obligation ever arose under 29 U.S.C. § 504(d). [Opp. 13, emphasis in original.]

Petitioner sued precisely because his right to the establishment of salary escrows never inured. But for the Waterfront Commission's conduct, it would have inured, for he would have been removed from office by operation of § 504

upon sentencing.

Put differently, Mr. Carson did not sue the Waterfront Commission for failing to establish the salary escrow -- something it was never obligated to do. Rather, Petitioner complains that the Waterfront Commission's actions tortiously interfered with his prospective economic advantage by acting in an unprecedented manner designed to relieve his union employers of the § 504(d) duty to establish salary escrows. The parties do not dispute that unless the Waterfront Commission acted within its lawful authority, it committed an actionable wrong and the Complaint should not have been dismissed for failure to state a claim.

2. The Waterfront Commission acted on a claimed removal authority enacted <u>after</u> Congress approved the Compact. At Opp. 1, the Commission claims it "is vested with authority by N.J.S.A. 32:23-80; N.J.S.A. 32:23-80.2 (WCA § 8) to remove

any 'officer, agent or employee' of a waterfront labor organization" upon conviction. Any removal authority that can be inferred from those statutes is based on enactments passed subsequent to Congress' consent to the Compact.

Specifically, N.J.S.A. 32:23-80 as originally enacted in 1953 merely contained prohibitory language against collection of dues by unions whose officers had been convicted. It was amended in 1962 to provide additionally for criminal sanctions, but not for direct removal. N.J.L. 1962, c. 5, § 3. N.J.S.A. 32:23-80.2, which is directed at convicted officers and empowers the Commission to bring a civil action in the Superior Court of New Jersey to effect removal, was enacted at the same time. N.J.L. 1962, c. 5, § 5(8-b). See International Longshoremen's Association (Gardner) v. Waterfront Commission, 495 F.Supp. 1101, 1107-1108 (S.D.N.Y. 1980) (reviewing New York's parallel § 8

amendments), affirmed, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981).

Thus, the specific statutory language upon which Respondent relied when it demanded Mr. Carson's removal from office was enacted years after Congress gave its consent to the Compact. The Waterfront Commission is therefore wrong when it challenges Petitioner's view "that Congress improperly signed a legislative 'blank check' when it gave its consent to [future enactments furthering] the Waterfront Commission Compact." Opp. 4. Precisely because the Waterfront Commission relies on language not found in the original § 8, it is mistaken when it maintains that "[t]he very foundation of [Petitioner's] argument is flawed in that WCA § 8 had already been enacted by New Jersey and New York and was before Congress in 1953." Opp. 4. While the original § 8 had indeed been approved in 1953, the § 8 that Congress had approved merely barred unions led by convicts from

collecting dues; it gave the Waterfront Commission no authority whatsoever to remove the convicted union officer.

3. The post-Congressional-consent State enactment of a purported power to force removal of convicted officers should be tested against the doctrine which emerged in the Chadha line of cases. The Petition urged this Court to determine whether Congress has the constitutional power to authorize individual States to effectively amend interstate compacts without further congressional consent. The very fact that the Waterfront Commission claims removal authority on the basis of post-consent enactments puts into sharp focus the need for and appropriateness of inquiry under the line of cases springing from INS v. Chadha, 462 U.S. 919 (1983).[1]

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1. The court of appeals made no mention of the Chadha issue in its decision, although it was raised by Petitioner in his Brief and his Reply Brief.

Respondent does not acknowledge the presence of a Chadha issue. Instead, as already demonstrated, it pretends that the § 8 in place when Congress gave consent is the same § 8 in force when the Waterfront Commission acted against Mr. Carson. On that false foundation it would read the Chadha issue out of the Petition.

Certainly whether the Compacts Clause gives Congress, when consenting to an interstate compact, the power to give a blanket approval to future State "enactments in furtherance thereof," 67 Stat. 541, P.L. 83-252 (1953), is an important issue concerning constitutional federalism that is deserving of this Court's attention. After all, given that "congressional consent transforms an interstate compact within the Clause into a law of the United States," Cuyler v. Adams, 449 U.S. 433, 437 (1981), the "enactments in furtherance" language in

the approval of the Waterfront Commission Compact purports to delegate powers vested in Congress to the State legislatures, allowing them to amend federal law. Such a delegation of congressional power is wholly inconsistent with the Constitution as construed in the Chadha line of cases.

4. **Prior to the 1984 amendments to 29 U.S.C. § 504, the Commission never sought removal of a union officer before sentencing.** At Opp. 12, Respondent asserts (emphasis in original):

> Carson's claim that he was singled out for WCA § 8 removal prior to sentencing is belied by the fact that in 1988 the Commission had the benefit of the Local 1804 and Scotto cases, as well as the determination of the Second Circuit in International Longshoremen's Association [Gardner] v. Waterfront Commission. * * * Those cases, which predated the 1988 WCA § 8 removal of Carson by many

> years, as noted, uniformly held that "conviction" under WCA § 8 occurs upon the entry of a plea of guilty or upon the return of a guilty verdict at the trial court level.

Each of the three cases invoked by the Waterfront Commission does stand for the proposition that "conviction" means return of a guilty verdict under State law. However, in each of those cases, Respondent did not seek removal until after sentencing. International Longshoremen's Association (Gardner) v. Waterfront Commission, 495 F.Supp. 1101, 1105 (S.D.N.Y. 1980) (at issue is "whether certain union officials, recently sentenced after trial, should be forced out of their union jobs now rather than after their appeals have been exhausted"), affirmed, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981); Local 1804, ILA (Cashin) v. Waterfront Commission, 171 N.J.Super. 508, 509, 410 A.2d 73 (App. Div. 1979) (guilty verdict

on April 11, 1978; letter from Waterfront Commission demanding removal on July 3, 1978), affirmed, 85 N.J. 606, 428 A.2d 1283 (1981); Scotto v. Waterfront Commission, No. 5580/80, Slip 2-3 (Sup. Ct.) ("On January 22, 1980, the date that Scotto was sentenced, the General Counsel of defendant Waterfront Commission sent a letter to him" asserting, "'Your convictions are within the purview of Section 8 ...'"), appeal dismissed, 434 N.Y.S.2d 1004 (App. Div.), appeal denied, 50 N.Y.2d 709, 415 N.E.2d 984 (1980).

While New Jersey and New York local law undoubtedly views a guilty verdict as a "conviction," even if it is never reduced to judgment or is ultimately overturned, the fact remains -- and Respondent does not and cannot dispute -- that in every prior case of the Waterfront Commission's demanding removal of a union officer, no demand was ever

made until after sentencing.

Therefore, given the Rule 12(b)(6) posture of this proceeding, it must be assumed that the Commission's seeking Mr. Carson's removal from office before sentencing, an arbitrary change from its consistent prior practice, was undertaken with the specific purpose of defeating Petitioner's prospective interest in 29 U.S.C. § 504(d) salary escrows.

Accordingly, this Court should determine whether Petitioner states a claim upon which relief can be granted when he asserts that a governmental agency established under an interstate compact acts ultra vires, and in derogation of the Supremacy Clause and the procedural and substantive requirements of the Due Process Clause of the Fourteenth Amendment, when it changes its usual behavior in order to defeat accrual of federal statutory benefits.

5. If WCA § 8 is a part of federal law, "conviction" in § 8 should be construed as it is defined in 29 U.S.C. § 504(c)(1) and consistent with Criminal Procedure Rule 32; if § 8 is not federal law, the State definition accepted below should be tested against the Supremacy Clause. Respondent closes its opposition with the following sentence (Opp. 16): Even if WCA § 8 is deemed federal law (Carson Petition, pp. 27-29), it has not in any way been repealed by necessary implication by the 1984 amendment to 29 U.S.C. 504, Rodriguez v. U.S., 480 U.S. 523, 107 S.Ct. 1391, 1392 (1987)."

Petitioner is not arguing any repeal by implication. Those words do not appear in the Petition.

Petitioner does maintain that De Veau v. Braisted, 363 U.S. 144 (1960) should not control, because in that case federal labor law and the Compact worked toward a common end. In this case, the addition of § 504(d) to federal labor law created

an inconsistency with the Compact's purpose, for § 504(d) is not intended to end union corruption, but rather to benefit the wrongly convicted, such as Petitioner.

Moreover, Petitioner maintains that if § 8 is to be deemed a part of the Waterfront Commission Compact to which Congress consented in 1953, as this Court held in De Veau, then it must be construed as federal rather than State law because Congressional consent transformed the Compact into federal law. NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission, 732 F.2d 292, 298 (2d Cir.) ("we hold that the consent of Congress transformed the Compact into federal law"), cert. denied, 469 U.S. 852 (1984). See generally, Cuyler, supra, 449 U.S. at 438-440.

Therefore, (1) all of the decisions holding that for purposes of WCA § 8, "conviction" means return of a guilty verdict -- Scotto, Cashin, Gardner, and

the decision below -- mistakenly relied on irrelevant State decisions while disregarding federal authorities; and (2) as a matter of federal construction, it would be absurd in the extreme for Congress to carefully define "conviction" in § 504(c)(1), and to make that definition consistent with Federal Rule of Criminal Procedure 32, while intending the same term in § 8 to mean something totally different. That absurdity is exacerbated when making a guilty verdict tantamount to a conviction would defeat the salary escrow requirement of § 504(d) for those wrongfully convicted union officials who happened to be subject to the Waterfront Commission's jurisdiction.

Conversely, if this Court were to abandon De Veau's view that § 8 was the subject of congressional consent, and thereupon hold that it is purely State legislation subject to State rules of construction, a Supremacy Clause problem inevitably arises. It arises because § 8

(as construed and applied by the Waterfront Commission) clearly interferes with the operation of subsequent federal legislation. See, e.g., Rose v. Arkansas State Police, 479 U.S. 1, 3 (1986) (per curiam).

These constitutional questions disappear if the term "conviction" in § 8 must be defined by reference to federal rather than State law -- something the courts below and the State courts have refused to do, notwithstanding Cuyler and NYSA-ILA Vacation & Holiday Fund.

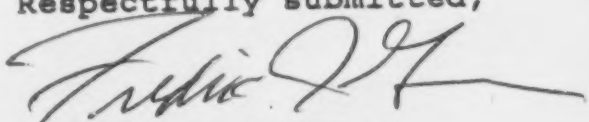
In light of the manifest inconsistency between NYSA-ILA Vacation & Holiday Fund, holding that the Compact is federal law, and the decisions in Gardner, Scotto, Cashin, and below, holding that § 8 is to be construed under State law, this Court should definitively resolve (1) whether "conviction" for purposes of WCA § 8 is to be defined by reference to State or federal law, and (2) whether any definition inconsistent with the

definition in § 504(c)(1) can survive scrutiny under the Supremacy Clause, the Compacts Clause, and the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons and those previously stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit at Docket Number 95-5309.

Respectfully submitted,



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